a safer position; to the distinctness, certainty and extent, or degree of the peril, and so on." "May the ordinary person," said the court, "with his eyes open and with abundant accommodations before him, which are safe, accept an invitation from the carrier to ride on the cow-catcher, and then, if injury arises from it, be allowed to set up the invitation as a legal answer to the charge of contributory negligence? To conclude that he might would be to permit a person of full capacity to exempt himself from the duty and responsibility appertaining to him as a moral being, and in substance to stultify himself in order to cast a liability on another." Judges cannot denude themselves of the knowledge of the incidents of railway travelling, which is common to us all:" *Lake Shore & Mich. Rd.* v. *Miller*, 25 Mich. 274; *Siner* v. *Great Western Rd.*, L. R., 4 Ex. 123; *Dublin, Wicklow & Wexford Rd.* v. *Slattery*, 3 App. Cases 1155; s. c. 10 Ir. Rep. 256; 24 Eng. 713.

If the passenger sits on the steps of the front platform, against the warning of the conductor, without making an effort to secure himself by holding on to the railing, he will be deemed guilty of contributory negligence, and cannot recover, if injured: *Wills* v. *Lynn & Boston Rd.*, 129 Mass. 351.

In *Ward* v. *Central Park Rd.*, 33 N. Y. 392; s. c. 11 Abb. Prac. Rep. (N. S.) 411; s. c. 42 How. Pr. 289, the plaintiff was standing on the edge of the rear platform of the defendant's car, and was thrown off and injured. He made no effort to hold on. He was not permitted to recover.

The recent case of *Heckrott* v. *Buffalo St. Rd.*, Superior Ct. Buffalo, 13 Am. Law Record 295, is interesting, and contains a thorough review of the cases. Here the plaintiff took passage on the defendants' car, he standing on the front platform, with his foot on the iron rod near the dash-rail, and his back against the window, from which position he fell off the car and was injured. In an action against the company it was held that he could not recover, as his situation was the proximate cause of the injury.

B. E. Black.

San Jose, Cal.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF ILLINOIS.[1]

COURT OF ERRORS AND APPEALS OF MARYLAND.[2]

SUPREME COURT OF NEW JERSEY.[3]

SUPREME COURT OF VERMONT.[4]

SUPREME COURT OF WISCONSIN.[5]

Action. See *Husband and Wife.*

Agent. See *Insurance.*

Illegal Transaction—Estoppel.—An agent who receives money for his principal upon a contract not criminal or immoral in its character, but

1 From Hon. N. L. Freeman, Reporter; to appear in 113 Ill. Rep.

2 From J. Shaaff Stockett, Esq., Reporter; to appear in 63 Md. Rep.

3 From G. D. W. Vroom, Esq., Reporter; to appear in 18 Vroom.

4 From Edwin L. Palmer, Esq., Reporter; to appear in 57 Vt. Rep.

5 From F. K. Conover, Esq., Rep.; will probably appear in 63 or 64 Wis. Rep.

contrary to public policy only, will be estopped from setting up the supposed illegality of such contract in defence to an action by his principal to recover the money in his hands: *Taylor* v. *Pells*, 113 Ill.

In this case a person, as the agent of a firm of contractors for the construction of a railroad, procured subscriptions for the purpose of securing the location of a depot at a certain point on the road, in which those who made the subscriptions were interested, the contractors having the power, under the terms of their arrangement with the railroad company, to fix the location of the depot at the place desired. The agent who thus procured the subscriptions was at the time a director in the railroad company, and, having applied the proceeds of the subscriptions to his own use, in a suit by his principals to recover from him the money so obtained, he set up the supposed illegality of the contract resulting from his official relation to the railroad company, as a defence; but it was *held*, he was estopped from relying upon such defence as against his principals: *Id.*

ASSIGNMENT. See *Attachment.*

Tort—Right of Assignee to Sue.—A cause of action for the obstruction of a navigable river was assigned absolutely in consideration of the assignee applying the net proceeds of the claim to the payment of certain debts of the assignors and paying any overplus to such assignors: *Held*, that the assignee might maintain the action in his own name: *Gates* v. *Northern Pacific Railroad*, 63 or 64 Wis.

ATTACHMENT.

Effect of—Assignment intervening between two Attachments.—After a debtor to a defendant in attachment had been garnished by a creditor of the defendant, the latter transferred and assigned his claim or demand to another creditor, and notice of the transfer was given to the debtor, when a second creditor in attachment against the same defendant garnished the same debtor, and both suits proceeded to judgment at the same term. The funds in the hands of the garnishee were not sufficient to satisfy the two judgments, and the court ordered the same to be apportioned between the two judgment creditors to the exclusion of the assignee of the debt owing by the garnishee: *Held*, that the court decided in accordance with the law: *Reeve* v. *Smith*, 113 Ill.

A chose in action is not assignable, either at common law or under our statute, so as to vest the legal title in the assignee. Such assignee will take the same subject to all defences that existed against the assignor. He stands in the shoes of his assignor, and can claim no greater rights in the demand assigned than could his assignor: *Id.*

ATTORNEY.

Privileged Communications.—Where two parties go together to an attorney, and make statements to him in the presence of each other, such statements are not confidential communications intended to be withheld from the opposite party, and there is no error in permitting the attorney to testify thereto in a suit between the parties relating to the subject-matter of such communications: *Lynn* v. *Lyerle*, 113 Ill.

BAILMENT.

Shipment of Goods without Order—Delivery to Carrier—Consignor and

Consignee—Lien of Factor—Assumpsit—Trover—Measure of Damages. —Where goods have been shipped to one who has not ordered them, title does not pass to the consignee by delivery to the carrier, and the right to change the consignment and destination during the transportation remains in the shipper: *Ruhl* v. *Corner*, 63 Md.

If the factor have claims for advances against his principal, and it be expressly agreed that goods shall be shipped to the factor to pay those advances, the law makes the delivery to the carrier a delivery to the consignee, though a factor. But such is not the case where there is no agreement or mutual assent on the part of the consignor and consignee to that effect at the time of the shipment of the goods: *Id.*

If the factor receives a consignment of goods for sale, while the goods are still the property of the consignor, the lien of the factor for previous advances to the consignor will at once attach, and the consignor will have to pay the advances in order to release the goods: *Id.*

But if while the goods are *in transitu* and at his risk, the consignor parts with the title, the goods are no longer his, and the lien of his factor will not attach, although the goods actually come into his possession: *Id.*

C. was a commission merchant in Baltimore, to whom M. in Minnesota had, prior to the month of January 1882, made consignments of flour for sale upon commission. On the 21st of January 1882, M., without any order from C., consigned to him a car load of flour for sale. No bill of lading was sent to C.; but M. advised him of the shipment by letter, and named a price at which he should sell. At the time of the shipment, M. was indebted to C. on account of advances made upon previous shipments, but it did not appear that he knew, or that C. had informed him of the state of the accounts between them. While the goods were in transit, M. sold the flour to R. in Baltimore, and had the bill of lading made out in R.'s name, and gave the carriers the necessary instructions for having the flour delivered to R., at Baltimore, instead of to C. Through a failure to carry out these instructions, the flour was delivered to C., by whom it was sold. In an action of assumpsit brought by R. against C., it was *held:* 1st. That the property in the flour had vested in R., who was entitled to maintain the action. 2d. That R. having sued in assumpsit, and not in trover, he was only entitled to recover for the money received from the sale of the flour: *Id.*

COMMON CARRIER. See *Negligence.*

Railroad—Passenger riding in dangerous place—Contributory Negligence.—Plaintiff's intestate, who, in pursuance of a contract for the carriage of horses, and in accordance with the custom in such cases, was riding in the same car with the horses in order to care for them, was killed in a collision caused by defendant's gross negligence. *Held*, that he would not, as an ordinary passenger who had voluntarily placed himself in a dangerous position, be deemed to have been guilty of contributory negligence: *Lawson* v. *C., St. P., M. & O. Ry. Co.*, 63 or 64 Wis.

Where it is customary for some person to ride in the same car with horses, to care for them, it would seem to be within the general authority of the conductor of the train to grant permission to a person so to ride for that purpose: *Id.*

Constitutional Law.

Impairing Obligation of Contract—Charter of Corporation—Alteration of Proceedings as to Land Damages.—The rule that the legislature does not impair the obligation of a contract by limiting or altering the modes of proceeding for enforcing it, provided the remedy be not withheld or embarrassed with conditions or restrictions which impair the value of the right, applies as well to irrepealable charters as to contracts between individuals: *State* v. *Weldon*, 18 Vroom.

The charter of a railroad company, which was irrepealable, gave the company the power to take lands by condemnation, and provided for an appeal by the land-owner, from the award of damages, to a certain court: *Held*, that a general statute which took away the right to appeal to that court, and gave an appeal to another court on the same terms and conditions, and with the same mode of trial, was not unconstitutional: *Id.*

Criminal Law.

Gambling—Pool Selling.—The selling of pools on horse-races, and the keeping of rooms where such pools are sold, do not constitute an offence within the meaning of a statute which prohibits the keeping of a gaming table or other place of gambling, and which declares that all games, devices and contrivances at which money or any other thing shall be bet or wagered, shall be deemed a gaming-table: *James* v. *State*, 63 Md.

Evidence—Competency of an Accused Party to Testify as to his Intent.—A person on trial for an assault with intent to murder, is competent to testify as to the purpose for which he procured the instrument with which he committed the assault: *Fenwick* v. *State*, 63 Md.

Larceny—What Constitutes at Common Law—Possession of Goods.—At the common law there are three cases in which a conviction for larceny may be sustained when the apparent possession is in the accused: First, where the accused has the mere custody of the property, as contradistinguished from possession, as in the case of servants and the like: second, where he obtains the custody and apparent possession by means of fraud, or with the present purpose to steal the property; and third, where one has acquired possession by a valid contract of bailment, which is afterward terminated by some tortious act of the bailee, or otherwise, whereby the possession reverts to the owner, leaving the custody, merely, with the former, and he feloniously converts the property to his own use: *Johnson* v. *The People*, 113 Ill.

Larceny at the common law is defined to be "the felonious taking and carrying away of the personal goods or property of another." Every larceny at common law includes a trespass to personal property, and no one lawfully in the possession of goods can commit a larceny of them at common law: *Id.*

Goods on the premises of the owner, to be used by himself and family including his servants, are always deemed to be in the possession of the owner, although the ordinary duties of the servants and other members of the household require them, from time to time, to handle, occupy or use them, or even to sell or dispose of them. So where chairs, beds, &c., are occupied by a guest, whether in a hotel or private family, or where plates or other articles are used by one at the table of another, or where the owner delivers a chattel to another to be examined or used for some temporary purpose in the presence of the owner, the same rule

applies. In all such cases the possession remains with the owner, and those having the temporary use or occupancy are deemed to have only the mere custody, and a felonious taking of the same by them is larceny: *Id.*

But when the owner of a chattel delivers it to one, other than a mere servant, in trust, upon a contract that the latter will faithfully execute the trust, the rule is different. In such case, which is an ordinary bailment, the possession as well as the custody passes to the bailee with its delivery, and while the bailment exists the bailee cannot, by the common law, commit a larceny of the chattels: *Id.*

Where the possession is not fairly and honestly obtained, as when there is an original purpose on the part of the bailee to steal the property, and the bailment is a mere pretence on his part to hide a felonious intent, the possession will not pass; and if the property is subsequently converted in pursuance of such criminal purpose, it will be larceny, by the common law: *Id.*

Where the owner intends to part both with the title and possession, and the property is delivered in pursuance of such intention, the person receiving it cannot be convicted of larceny, although the transfer was induced by the fraud of the latter, and with a purpose to steal the property: *Id.*

Evidence—Bastardy—Exhibition of Child in Court.—In bastardy proceedings the bastard child may not be exhibited to the jury for the purpose of showing by its likeness to the defendant that it is his child: *Hanawalt* v. *State*, 63 or 64 Wis.

Assault and Battery—Evidence—Participation.—Where the assault and battery complained of were part of one preconcerted affray, evidence of the circumstances of other fights engaged in by the defendants in the execution of their unlawful purpose, is admissible: *Rhinehart* v. *Whitehead*, 63 or 64 Wis.

A person who goes to a place with others with the intent to get up a fight with persons there, may be liable for an assault and battery committed in the execution of that purpose, although he did not actually participate in such assault: *Id.*

DAMAGES. See *Bailment; Negligence; Pleading.*

Death—Statutory Action by Next of Kin—Nature and Measure of Damages.—Damages recoverable for the death of any person are limited by the statute to such as arise from pecuniary injury, resulting from the death, to the widow and next of kin: *Demarest* v. *Little*, 18 Vroom.

Injury received by some of the next of kin, by the dissolution of a partnership relation between them and deceased, is not within the scope of the statute: *Id.*

Injury claimed to arise by the deprivation of such services and counsel as a father might probably give to his children, must be limited to such services and counsel as would be of pecuniary advantage, and must be determined with careful reference to the age, condition and relations of the parties: *Id.*

Where the injury claimed is the deprivation of the probability of receiving such probable accumulations as deceased might have made if he had continued in life, income derivable from funds invested, and

which the next of kin have received, should not be taken into account, and due weight must be given to contingencies which might diminish the probable accumulations or divert them from the next of kin: *Id.*

DEBTOR AND CREDITOR. See *Execution; Sale.*

DEED.

Construction.—B., being the owner in fee of a tract of land, conveyed to his mother an undivided third part of it during her widowhood. Subsequently B. and his wife conveyed the same land to W. by a deed, the granting clause of which states that the grantors did thereby convey "unto the said J. W., his heirs and assigns, all their estate, right, title and interest, trust property or claim and demand whatsoever at law or in equity of them, the said S. A. B., and N., his wife, of, in and to, the following described parts of tracts or parcels of land. * * * It is understood by the parties herein mentioned, that the interest herein conveyed is the two-thirds of the above described land:" *Held*, that this deed only conveyed to W. a two-thirds interest in the land described: *Zittle* v. *Weller*, 63 Md.

The rule which requires a deed to be construed most strongly against the grantor, is to be resorted to and relied on only when all other rules of exposition fail to reach with reasonable certainty the intention of the parties: *Id.*

The rule that where there are two contradictory or repugnant clauses in a deed the first clause shall prevail over the latter, has no application to a case where the supposed contradiction is between parts of the same clause: *Id.*

DEVISE.

Catholic Bishop—Religious Corporation—Equitable Conversion.—A. devised unto B., a Catholic bishop, in his individual capacity, all the real and personal property owned by the testator at his death, in trust that upon the request of a certain religious congregation, the trustee would sell the property, either at public or private sale, and apply the proceeds to the erection or maintenance, or both, of an orphan asylum, under the direction of, and as requested by such congregation: *Held*, that this was not a devise of real estate to a religious corporation, but to an individual as a trustee, and is not prohibited by any statute or law of this state: *Germain* v. *Baltes*, 113 Ill.

Where a testator devised all his real and personal estate to one as a trustee, to be sold and converted into money when so requested by an incorporated religious society, and applied in establishing an orphan asylum, to be under the direction and control of such society, it was *held*, that the devise in favor of the charity was a devise of money and not of land, and was such as the courts will uphold: *Id.*

EVIDENCE. See *Criminal Law.*

Lease—Unsigned Memorandum of Terms—Res gestæ.—In the course of a negotiation for a lease, a paper was partly written by the defendant and handed by him to the plaintiff, and by him interlined and returned to the defendant, which paper was not signed by either of the parties. On the trial the question was whether the terms of the lease were those mentioned in the paper only, or there were other terms agreed

upon outside of it: *Held*, that this paper, although unsigned, was admissible in evidence as part of the *res gestæ*: *Freeman* v. *Bartlett*, 18 Vroom.

EXECUTION.

Exempt Property—Fraudulent Purchase of by Debtor.—An insolvent debtor who sells property which is subject to levy on execution, and with the proceeds immediately purchases exempt property, will be presumed to have done so with intent to hinder, delay, or defraud his creditors; but the property so purchased does not, for that reason, cease to be exempt. The only remedy of the creditors is by attacking the sale of the non-exempt property: *Comstock* v. *Bechtel*, 63 or 64 Wis.

EXECUTORS AND ADMINISTRATORS. See *Husband and Wife.*

EXEMPTION. See *Execution.*

FACTOR. See *Bailment.*

FIXTURES.

What are—Remedy for Removal.—Boards in a corn barn, used for a permanent floor, and stone posts, deposited upon the farm for the purpose and with the intention of building necessary fences, could not lawfully be sold as personalty by an officer on the extent: *Hackett* v. *Amsden*, 57 Vt.

Trespass *de bonis* is the proper form of action to recover for the boards and posts; as the claim was not for breaking and entering, but for taking and carrying away: *Id.*

HUSBAND AND WIFE. See *Insurance.*

Action—Promise of Husband to repay Moneys received from Wife—Promise of Executors.—A suit at law will not lie on a promise of a husband to repay to his wife moneys received by him for her during coverture: *Rusling* v. *Rusling*, 18 Vroom.

But such suit will lie against the executors of the husband on a promise made by them officially to pay the moneys so received by the husband: *Id.*

Feme Covert—Personal Tort—Joinder of Husband and Wife—General Demurrer.—A *feme covert* brought suit for a personal tort, by her next friend. It appeared on the face of the declaration that she had a husband living. On general demurrer to the declaration, it was *held*, 1st. That the suit should have been brought in the names of the husband and wife jointly; 2d. That as the defect appeared upon the face of the declaration, advantage could be taken of it by general demurrer: *Treusch* v. *Kamke*, 18 Vroom.

LANDLORD AND TENANT. See *Nuisance.*

MORTGAGE.

Chattel Mortgage—Certainty of Description—Chattels to be consumed for Benefit of Mortgagee.—The description of property in a chattel mortgage as "Forty-one Berkshire hogs and sixty-five grain sacks," is not so uncertain as to invalidate the mortgage: *Knapp* v. *Deitz*, 63 or 64 Wis.

A mortgage of chattels furnished by the mortgagee to the mortgagor and to be used and consumed by him for the benefit of the mortgagee, is not void as to the creditors of the mortgagor: *Id.*

Animals—Increase—Bona Fide Purchaser.—Where domestic animals are mortgaged during the period of gestation, the offspring when born will, as between the parties to the mortgage, be covered thereby; but as against a *bona fide* purchaser or encumbrancer acquiring his title or lien without notice of the facts and after the period of nurture has passed, such offspring will not be covered by the mortgage: *Funk* v. *Paul*, 63 or 64 Wis.

One who takes a mortgage of chattels to secure a pre-existing debt which is not yet due, and without any new consideration, is not entitled to protection as a *bona fide* purchaser or encumbrancer: *Id.*

Improper Filing—Rights of Mortgagee to Insurance Money as against Attachments.—A mortgagee of chattels which are insured by a policy providing that the loss shall be payable to him as his interest may appear, is entitled to the insurance money to the amount of the mortgage debt, as against creditors of the mortgagor garnishing the insurance company after a loss, although the mortgage was not properly filed: *Mawson* v. *Phœnix Ins. Co.*, 63 or 64 Wis.

Municipal Corporation.

Council—Seating of Member—Conclusiveness of First Investigation.—The common council of a city, made by the charter the sole judge of the election and qualifications of its own members, having once investigated and seated a member, cannot, at a subsequent meeting, order a second investigation: *State* v. *City Council of Camden*, 18 Vroom.

Negligence. See *Common Carrier.*

Opening in Sidewalk—Contributory Negligence—Damages—Evidence.—For an injury resulting from a fall into an opening in the sidewalk of a public street, communicating with a cellar of the adjoining building, and left without guard or notice of danger, the owner and occupier of the premises is liable: *Houston* v. *Traphagen*, 18 Vroom.

Whether the injured person contributed to the injury by his negligence depends on the circumstances; and where it appeared that he stepped into the unguarded opening while his attention was attracted by objects in a shop window above the opening, the plaintiff should not be nonsuited, and a verdict in his favor should not be disturbed: *Id.*

When it is claimed that the fall produced or excited disease, it should appear, in order to recover damages for the results of the disease, not only that the fall was a possible cause of the disease, but other causes should be so excluded and the circumstances should be such as to leave a reasonable inference that the fall was the actual cause: *Id.*

Ferry-boat—Passing Ashore in Crowd.—A person who, in passing from a ferry-boat to the dock, puts himself in so dense a crowd that he cannot see to his footing, and in that situation gets his foot crushed between the boat and the dock, has no cause of action against the ferry company, as his own negligence has been contributory to the injury: *Dwyer* v. *N. Y., L. E. & W. Ry. Co.*, 18 Vroom.

NUISANCE.

Liability of Landlord—Stipulation of Tenant to Repair.—He who creates a nuisance on his own premises cannot escape liability for its continuance by demising the premises whereon the nuisance is: *Ingwersen* v. *Rankin*, 18 Vroom.

Such liability will exist although the tenant by his demise stipulates to keep the premises in repair: *Id.*

A landlord whose tenant during the term has created a nuisance on the demised premises will not be liable therefor so long as he has no right of entry or power to abate; but when the term expires, or the landlord may enter and abate the nuisance, he will become liable for its continuance, and that liability cannot be evaded by a renewal of the lease, though with covenants to repair and without the landlord's having taken actual possession: *Id.*

Quære. Whether knowledge of the existence of the nuisance is necessary to establish the landlord's liability in such cases: *Id.*

PARENT AND CHILD.

Support of Child—Allowance out of his Estate.—The parents of an infant child lived apart, and the mother supported it both before and after lands were devised to it. Upon the death of the child the parents became its sole heirs: *Held*, that in equity the mother was entitled to an allowance out of the child's estate for the amount expended by her upon its support. TAYLOR, J., dissents: *Pierce* v. *Pierce*, 63 or 64 Wis.

PARTNERSHIP.

Agency—Execution by one Partner of Sealed Instrument.—A partner cannot bind his copartner by warrant of attorney under his hand and seal in the name of the firm where there has been no previous consent or authority given or subsequent ratification: *Ellis* v. *Ellis*, 18 Vroom.

PAYMENT. See *Usury.*

PLEADING.

Action for Tort—Damages.—In an action for a personal tort, the amount of the damages claimed must be laid in the declaration; and if no damages are laid the defect will be fatal on general demurrer: *Treusch* v. *Kamke*, 63 Md.

The amount of the damages claimed in such case is a jurisdictional fact. If the amount exceed $100, the Court of Common Pleas has jurisdiction, if it be less than $100, a justice of the peace has exclusive jurisdiction: *Id.*

RAILROAD. See *Common Carrier.*

SALE.

Change of Possession—Exception to Rule—Fraud in Law.—A sale of saw logs piled on land so low and wet that it was impossible to remove them, only on frozen ground, without the cost exceeding the value of the logs, is valid against attaching creditors, without a change of possession: *Kingsley* v. *White*, 57 Vt.

But, if a change of possession had been necessary, it was *held*, that

the facts, that the vendor had sold and conveyed the lot to a third party by a deed with only one witness to it, that such third party, the vendor and the purchaser, with his attorney, went on to the lot, and marked the logs with the purchaser's initials, the third party agreeing to take care of them for him, did not constitute a sufficient change of possession, as it was not found—and the court could not infer it—that the third party was in open, visible possession of the lot: *Id.*

SET-OFF.

Judgments—Decree in Admiralty.—A decree in admiralty in favor of a libellant, on a libel for damages in a federal court, may be set off against a judgment recovered in this court against the libellant, the parties in the two suits being the same: *Schautz* v. *Kearney*, 18 Vroom.

STREET. See *Negligence.*

SUBROGATION.

Joint Sureties—Separate Bonds—Different Conditions.—The rule that if one of two joint sureties for an insolvent principal holds collateral the other is entitled to share in it, does not apply where the sureties are on separate bonds to secure a faithful discharge of duty on the part of the principal acting in differents capacities, first as guardian of an insane ward, and then on the ward's death, as administrator of her estate, when the collateral was not given as security for signing the bond, but for signing as surety certain bank notes; and this is so, although, after it was claimed that the principal was in default, the sureties entered into a written agreement to join in defence and share equally in the liability; and the defendant realized more out of the collateral than he was compelled to pay on said notes: *Somers* v. *Johnson*, 57 Vt.

SURETY. See *Subrogation.*

Surrender of Security offered in lieu of Note.—The orators were sureties on a note, and the defendant the payee. The principal attempted to induce the payee to accept his own note secured by a mortgage on a lot of land owned by him in lieu of his note with said sureties; and the payee took the mortgage into his possession, and agreed to exchange, if on examination he should find the title clear of encumbrance. On being informed by the town clerk that there was an undischarged mortgage on the land he refused to exchange, and returned the mortgage to the principal, although the surety requested him to hold it. It turned out afterwards, that the land was clear. A bill having been brought to restrain the payee from collecting the note; *held*, that the rule, that the voluntary surrender by a creditor of security pledged by the principal for the debt discharges the surety, does not apply, and that the bill should be dismissed: *Adams* v. *Dutton*, 57 Vt.

TRIAL.

Notes of Evidence—Variance—Question for Jury—Testimony of Attorney.—When an official reporter is not present at a trial to take down the exact words—the court having made no minutes—and counsel disagree as to what a witness said on a matter material to the issue, it is

not only proper for the court to submit the question to the jury, but it is his duty to do so; and this is so, although the defendant moved for a nonsuit on the ground of variance: *Porter* v. *Platt*, 57 Vt.

In such a case, the testimony of an attorney with his minutes taken on trial, is not admissible to strengthen or weaken that of a witness given on the same trial: *Id.*

TROVER.

Property obtained by Fraud.—The title to property does not pass when possession is obtained by fraud; thus, the defendant falsely representing himself to be one of a firm of produce commission merchants in Boston, induced the plaintiff to send poultry to said firm to be sold on commission, with the fraudulent purpose of obtaining it without paying for it: *Held*, that the property did not pass, and that trover would lie for the conversion: *McCrillis* v. *Allen*, 57 Vt.

USURY.

Mortgages—Relief in Equity—Application of Payments.—The P. L. Co. held three mortgages made by D. of different dates. Usurious interest was paid on the two elder mortgages, and they were overpaid, the aggregate payments exceeding the amount of the principal with legal interest thereon. More than three years after the last payments made thereon, D. filed a bill for the redemption of all three mortgages, and for an account, and asked that the amount overpaid on the first two mortgages by reason of the usurious interest exacted, should be applied in reduction of the sum due on the third mortgage. On limitations pleaded in bar of the right to an account, it was *held*, that it being conceded that there had been an application of payments already made by agreement of the parties to the first two mortgages, those payments could not by mere operation of law be afterwards transferred to the subsequent debt created by the last mortgage: *Dickey* v. *Permanent Land Co.*, 63 Md.

The rule in regard to the application of payments is well defined. At the time when payment is made, there may be an application by agreement between the debtor and creditor. If there be no such agreement the debtor may make the application; and in the absence of any action on his part, the creditor may apply the money to the extinguishment of any claim which he has against the debtor. If there has been no application by parties, the law will apply the payment in conformity with established and recognised rules: *Id.*

But the law never makes an application of payment when the parties have already done so. And this rule governs even in the case of an application of money to the payment of an item in an account current which is not recoverable in an action at law: *Id.*

VESSEL.

Joint Owners—Conversion.—One joint owner of a vessel cannot maintain an action against his co-owner for a conversion thereof, except in case of a total destruction, or something equivalent thereto, through the fault of such co-owner. The fact that the co-owner has negligently damaged the vessel, or has run it into debt and created liens upon it beyond its value, is not sufficient: *Alderson* v. *Schulze*, 63 or 64 Wis.